SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 429

WILLIAM L. MAXWELL,

Petitioner,

—v.—

DAN D. STEPHENS, Superintendent
of Arkansas State Penitentiary.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR REHEARING

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL MELTSNER
LEROY D. CLARK
10 Columbus Circle
New York, New York 10019

GEORGE HOWARD, JR.
329½ Main Street
Pine Bluff, Arkansas

HAROLD B. ANDERSON
205 Century Building
Little Rock, Arkansas

ANTHONY G. AMSTERDAM
3400 Chestnut Street
Philadelphia, Pennsylvania

Attorneys for Petitioner

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Comes now the petitioner and respectfully prays the Court to grant rehearing in the above styled cause. This Court denied the petition for writ of certiorari in this cause on December 6, 1965. Subsequently, certiorari was granted in *Miranda* v. *Arizona* No. 759, *Vignera* v. *New York* No. 760, *Westover* v. *United States* No. 761, and *Johnson, et al.* v. *New Jersey* No. 762, in which the Court will decide issues involving the right to counsel, the conditions giving rise to a valid waiver of constitutional rights, and the admissibility of evidence taken while or after a defendant has been denied counsel or has not been informed of his right to counsel.

It is uncontradicted that police officers deliberately refused to allow petitioner to contact his family or an attorney

although he made repeated requests to do so. Neither was he informed of his right to counsel when arrested. This petition for rehearing raises an issue not heretofore asserted and which is based on the granting of certiorari in the above cited cases: can a defendant knowingly waive *any* important constitutional right when he is simultaneously denied his request for counsel.

Direct Refusal of Counsel to Petitioner

The District Court specifically found "that when petitioner was taken into custody and incarcerated in the city jail, he was not permitted to see his parents or a lawyer" (Tr. 49). The petitioner testified that after being arrested at approximately 4:00 a.m. on November 3, 1961 and being taken to the hospital for identification by the victim, he was carried to the city jail in Hot Springs, Arkansas, and questioned.

During questioning at the city jail, petitioner made a direct request for counsel: "I asked them could I use the telephone to call my—my mother, somebody to come up, a lawyer, or something, and they told me I weren't going to use the phone for nothing . . . " (Tr. 189; see also Tr. 190). This denial of counsel occurred somewhere between 4:00 a.m. and 7:30 a.m. when the petitioner was taken from the jail to the house where the crime had occurred.

The refusal of counsel continued from the point of arrest on November 3, 1961 at 4:00 a.m. through November 7, 1961. The petitioner, upon being transferred from the Hot Springs jail to the Malvern city jail asked to make a phone call and the sheriff there said that he had instructions from the Hot Springs police not to let the petitioner talk

to anyone. All petitioner's testimony concerning the denial of his repeated requests for counsel was uncontradicted.

Failure to Inform Petitioner of His Right to Counsel

The arresting officer, when asked whether, when he took petitioner into custody, he advised petitioner Maxwell or his mother that they were entitled to consult with an attorney, said: "No, I didn't give them any advice at all, because I didn't know whether he was being arrested or what" (Tr. 267). Captain Crane testified that he did not advise petitioner of his right to consult an attorney when he was first arrested and held in the Hot Springs jail (Tr. 250).

Concurrent Search and Seizure

At 5:00 a.m. on November 3, 1961, an hour after the petitioner was taken into custody, the police officers returned to his home. They claim petitioner's mother permitted them to enter, and that she agreed to a search of the petitioner's room during which they took a blue coat later used in evidence against the petitioner at the state court trial. The blue coat was obtained without a search warrant (see opinion of the District Court, 229 F. Supp. 205, 209). The police officers testified they informed petitioner's mother that he was charged with rape. The accusatory process clearly had begun. The officers, however, did not inform petitioner's mother that petitioner (or she in conjunction with petitioner) had a right to advice from counsel before participating further in what was now a phase of the prosecution (Tr. 267).

The Court of Appeals below did not purport to find the search and seizure constitutional. It was not incident to a lawful arrest. There were no emergency circumstances which justified the failure of the police to secure a warrant. The majority of the court turned its decision solely on whether objection to the unconstitutionality of the search was waived by petitioner's mother having consented to the search "freely and intelligently." *Maxwell* v. *Stephens,* 348 F. 2d 325, 336.

The Impact of *Escobedo* v. *Illinois*

The above facts are uncontradicted but an issue raised by these facts has not been asserted heretofore: when a search is clearly unconstitutional, can the court hold that there was a waiver of the right to object to that search, when simultaneously police directly refused the defendant's request for an attorney and failed to inform him of his right to counsel. The question in another form is: can there be an intelligent and knowing waiver of legal rights by a layman who has been denied access to a lawyer?

The legal effect to be given to the voluntary consent by petitioner's mother to the seizure of his effects is the key to this case and has already occasioned a dissent in the Court of Appeals by one judge solely on that issue, although he did not rest his opinion on the denial of counsel. The majority of the Court below agreed that petitioner had standing to object to the conditions under which the evidence was obtained which was used at trial against him. (See *Maxwell* v. *Stephens,* 348 F. 2d 325, at p. 334.)

The cases where the Court has recently granted certiorari raise the issue of the admissibility of a confession. But

there is a grave question of whether *Escobedo* v. *Illinois*, 378 U. S. 478 bars not only a finding of voluntary waiver of the right against self-incrimination but bars also finding voluntary waiver of objection to an unconstitutional search when there has been a direct denial of counsel.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL MELTSNER
LEROY D. CLARK
10 Columbus Circle
New York, New York 10019

GEORGE HOWARD, JR.
329½ Main Street
Pine Bluff, Arkansas

HAROLD B. ANDERSON
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3400 Chestnut Street
Philadelphia, Pennsylvania

Attorneys for Petitioner
in No. 429

CERTIFICATE OF COUNSEL

I, JACK GREENBERG, one of the attorneys for petitioner, hereby certify that this Petition is presented in good faith and not for delay. The Petition for Rehearing is filed because subsequent to the denial of the writ of certiorari, this Court granted certiorari in cases which may have effect on the issues now asserted by the petitioner which have not been raised heretofore.

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JACK GREENBERG